

But the respondent's brief listed the issues as: (1) Whether the Claimant suffered personal injury by accident on the date alleged; (2) Whether the Claimant's alleged accidental injury arose out of and in the course of employment; and, (3) Whether Claimant is entitled to medical treatment with Dr. Lepse for treatment of his right knee.

Respondent primarily argues that claimant had suffered a prior injury to his right knee for which surgery on his ACL had been recommended. Respondent contends this is the same diagnosis and recommended treatment for claimant after his alleged work-related injury. Consequently, respondent argues that claimant merely suffered a temporary aggravation of his preexisting condition and is not entitled to additional medical treatment because he did not prove that he suffered additional damage to his right knee.

Conversely, claimant argues that he had recovered from the previous injury to his right knee and the accidental injury suffered at work on February 24, 2003, aggravated and intensified his condition. Accordingly, claimant requests the Board to affirm the ALJ's Order For Medical Treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board affirms the ALJ's Order For Medical Treatment.

The claimant testified that on February 24, 2003, as he was walking between two lines he was monitoring at work, he stepped into a hole in the concrete floor. When he stepped into the hole the claimant twisted his right knee. Claimant reported the incident and was sent to the dispensary to be seen by respondent's doctor. Ultimately, an MRI revealed claimant had suffered a full tear of his ACL in his right knee. Dr. Lepse recommended surgery to replace or reconstruct the ACL.

It is undisputed that the claimant had injured his right knee while playing basketball in March 2002. Claimant was diagnosed with a possible ACL tear in his right knee. Surgery on the right knee was an option discussed with claimant at that time. Claimant elected conservative treatment, missed a couple of weeks of work and then returned to full duty work without restrictions. Claimant continued working until the injury on February 24, 2003. Claimant also returned to playing recreational basketball.

Claimant testified that after the first knee injury in March 2002 he was able to regain his strength and agility in his right knee. But after the incident at work on February 24, 2003, the claimant testified that he has not been able to improve. Claimant testified that after he works his knee swells and he has to ice it down and take ibuprofen. He denies he had that problem until after the work-related injury.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of

¹ K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The claimant's testimony is uncontroverted that he suffered accidental injury when he stepped in a hole at work and twisted his knee. It is further uncontroverted that he reported the accident and was sent to the plant dispensary for treatment. The dispensary records corroborate claimant's testimony.⁵

Claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and that he gave timely notice.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ Respondent argues that claimant suffered a temporary aggravation of his preexisting ACL condition in his right knee. The dispositive issue is whether claimant suffered permanent aggravation or intensification of his right knee condition.

Claimant admits that after the right knee injury he suffered in March 2002 he was diagnosed with a possible tear of the ACL. He further agrees that surgery for that condition was one of the treatment options he was given. But claimant further noted that he did not opt for surgery and after 6 to 8 weeks his knee condition had improved and did not prevent him from engaging in his usual work as well as every day activities.

After the work-related injury claimant's condition worsened requiring him to ice his knee for swelling at the end of a workday. Dr. Edward J. Prostic read the MRI of claimant's right knee and indicated it revealed a full tear of the ACL. Whereas, Dr. Prostic noted that the preexisting problem with the right knee was a probable partial thickness ACL rupture.

² K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ *Brobst v. Brighton Place North*, 24 Kan. App.2d 766,771, 955 P.2d 1315 (1997).

⁴ *Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁵ P.H. Trans., Cl. Ex. 4.

⁶ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

In summary, after the claimant injured his right knee playing basketball in March 2002, it was suspected that he suffered an ACL rupture or tear. But claimant chose non-operative treatment and recovered to the point that he again played basketball and never missed his regular work duties. After claimant injured his right knee at work an MRI revealed a full tear of the ACL and claimant has not been able to recover from that injury. Claimant has met his burden of proof that the work-related accident permanently aggravated and intensified his preexisting condition.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated September 3, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director